

The Honorable Brian D. Lynch  
Chapter: 11  
Hearing Date: September 29, 2010  
Hearing Time: 9:00 a.m.  
Hearing Location: Tacoma, Courtroom I  
Response Date: September 22, 2010

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

In Re:

HAWKS PRAIRIE INVESTMENT LLC,  
Debtor.

No. 10-46635-BDL

MOTION FOR APPLICATION OF THE  
SINGLE ASSET REAL ESTATE RULES

HomeStreet Bank ("HomeStreet"), through its undersigned counsel, moves for a determination that the Debtor's property is single asset real estate as that term is defined in Bankruptcy Code § 101(51B) and that the single asset real estate provisions of the Code, including § 362(d)(3), apply to this case.

**I. INTRODUCTION.**

**1.1 HomeStreet.**

HomeStreet is the principal secured creditor in this case holding secured note obligations exceeding \$32 million.

**1.2 This is a Single Asset Real Estate Case**

11 U.S.C. § 362(d)(3) imposes certain requirements on the debtor in a single asset real estate case. If a debtor in a single asset real estate case fails to satisfy these requirements—i.e., the commencement of payments to secured creditors or the filing of a feasible plan—within 90 days after the petition date or 30 days following the court's determination that the case is a single

MOTION FOR APPLICATION OF THE SINGLE ASSET  
REAL ESTATE RULES - 1

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1 asset real estate case, § 362(d)(3) requires that the court grant relief from stay with respect to the  
2 single asset real estate upon request of a party in interest and after notice and a hearing.

3 A determination by this Court that this case is a single asset real estate case will aid all of  
4 the parties in interest. As a consequence of such determination, the Debtor will be subject to the  
5 aforementioned requirements. Consequently, the Court will be required to grant relief from stay  
6 with respect to the Debtor's real estate in the event that Debtor fails to commence payments to  
7 secured creditors or file a feasible plan by November 11, 2010 (i.e., 90 days from the August 13,  
8 2010 petition date).

9 **1.3 The Applicability of the Single Asset Real Estate Definition Should be**  
10 **Decided at the Outset of the Case**

11 The Debtor declined on its petition in this case to describe the nature of its business as  
12 "Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)". Instead, the Debtor elected to  
13 check the "Other" box without providing an alternate description of its business. *See* Docket  
14 No. 1.

15 Because the Debtor refused in this case to check the appropriate box on its petition, the  
16 Court must enter an order providing that the property is single asset real estate.  
17 Section 362(d)(3), which entitles a secured creditor to relief from stay with regard to real  
18 property in certain circumstances, only applies when the property at issue is single asset real  
19 estate. Specifically, that section provides in part that relief from stay shall be granted unless the  
20 debtor commences payments to the creditors whose interest is secured by the property or files a  
21 confirmable plan

22 not later than the date that is 90 days after the entry of the order for relief  
23 (or such later date as the court may determine for cause by order entered  
24 within that 90-day period) or 30 days after the court determines that the  
debtor is subject to [§ 362(d)(3)], whichever is later . . .

11 U.S.C. § 362(d)(3).

25 As a result of the Debtor's failure to check the appropriate box on its petition, the case is  
26 not a single asset real estate case until the Court declares it so. Without that determination the

1 parties will not know whether the deadlines set forth in § 362(d)(3) apply. As a practical matter,  
2 § 362(d)(3) makes no sense unless a party in interest can seek a determination early in the case  
3 on the issue of whether the single asset definition and resulting deadlines apply.

4 This Court should enter an order declaring that the property is single asset real estate as  
5 that term is defined in § 101(51B) and directing that provisions of the Bankruptcy Code  
6 applicable to single asset real estate cases shall apply in this case. The facts support such an  
7 order.

## 8 II. FACTS

9 The property of the Debtor is a single real estate development project in Lacey,  
10 Washington. *See* Declaration of Mark Ahlstedt, ¶¶ 2-3. The assets of the estate are real  
11 property.<sup>1</sup> The business of the Debtor is development of real estate. The Debtor does not  
12 operate any business on the property. Any income from the property will be obtained through  
13 sale, rental or financing of real property. A case involving real property held for development  
14 and resale is the classic example of a single asset real estate case. The fact that there are multiple  
15 parcels does not alter the nature of the case or the application of § 362(d)(3).

## 16 III. ANALYSIS

### 17 3.1 The Single Asset Real Estate Provisions Apply

18 The Debtor's property is "single asset real estate" under the definition set forth in  
19 § 101(51B). The single asset real estate provisions apply even though the property is comprised  
20 of multiple legal parcels and has been proposed to be constructed in phases. *In re Club Golf*  
21 *Partners, L.P.*, 2007 WL 1176010, \*5 (E.D. Tex. 2007). An effect of the single asset real estate  
22 designation is contained in § 362(d)(3), which provides consequences for the Debtor's failure to  
23 timely file a confirmable plan or commence adequate protection payments. However, the issue  
24 presented relates not to the remedy, but to the definition of "single asset real estate."

25  
26 <sup>1</sup> The personal property of the debtor consists of equipment, material, records and documents  
related to development of real property

1 Section § 101(51B) defines single asset real estate as

2 real property constituting a single property or project, other than residential real  
3 property with fewer than 4 residential units, which generates substantially all of  
4 the gross income of a debtor who is not a family farmer and on which no  
substantial business is being conducted by a debtor other than the business of  
operating the real property and activities incidental.

5 Even though the property is comprised of multiple tax parcels or may be developed in phases, it  
6 nevertheless falls within the above definition. Any contrary finding would ignore the word  
7 “project” in the definition. *In re Kara Homes, Inc.*, 363 B.R. 399, 406 (Bankr. D.N.J. 2007).

### 8 **3.2 Multiple Lot Projects Are Single Asset Real Estate**

9 The leading case on the definition of single asset real estate is *In re Philmont Dev. Co.*,  
10 181 B.R. 220 (Bankr. E.D. Pa. 1995). In that case, the court stated that § 101(51B) enumerates  
11 certain criteria that must be satisfied before real property can be considered single asset real  
12 estate for purposes of § 362(d)(3). These criteria are: “[ (1) The subject real property must  
13 constitute a] single property or project, other than residential real property with fewer than 4  
14 residential units . . . [; (2)] that real property must generate substantially all of the income of the  
15 debtor . . . [; and (3)] the debtor must not be involved in any substantial business other than the  
16 operation of [such] property . . . ]” *Id.* at 223.

17 The Hawks Prairie development clearly meets all three relevant criteria. The *Philmont*  
18 case notably dealt with *two separate lots* and some limited partnerships. The *Philmont* Court  
19 stated as follows:

20 The Court . . . concludes that the particular type of property in question here falls  
21 squarely within the purview of the statute. In this respect, the [c]ourt is strongly  
22 influenced by the drafters [sic] decision to include two separate classifications of  
23 real property within the purview of section 101(51B). Under section 101(51B),  
24 real property includes “single property” as well as “single project[s].” The Court  
25 is convinced that even if the Debtor limited partnerships’ real property does not  
26 fall within the scope of a “single property,” because it consists of a string of semi-  
detached dwellings, the term “single project” can reasonably be interpreted as  
broad enough to encompass the series of semi-detached houses owned by the  
limited partnerships.

1 *Id.* The *Philmont* Court determined that the phrase “single project” in § 101(51B) would be  
2 rendered inoperable if a court were to conclude that the single asset real estate rule does not  
3 apply in a case involving two separate lots. *Id.* at 224-25. Because such a result would violate  
4 basic rules of statutory interpretation, such a determination would be improper. *Id.*

5 In *In re Pensignorkay, Inc.*, 204 B.R. 676 (Bankr. E.D. Pa. 1997), the property consisted  
6 of 275 acres in two separate parcels. The court held that the property, which was acquired for  
7 further subdivision and development, constituted a “single property or project.” *Id.* at 681-82;  
8 see also *In re Kara Homes, Inc.*, *supra* (multiple cases for affiliated developers of single family  
9 homes held to be single asset real estate cases).

### 10 **3.3 Follow the Money: The Debtor’s Income Will Come Solely From** 11 **Development and Disposition of the Property**

12 In addition to cases that have considered the status of the land in determining whether  
13 such land falls within the definition of single asset real estate, other cases have instead analyzed  
14 the sources of the income—actual or prospective—from the business of the debtor. If funds are  
15 to come from the sale or rental of the real estate, the single asset real estate rule applies. If there  
16 are services that generate revenue other than real property income, such as income from hotels,  
17 resort marinas and golf courses, courts have generally held that the property is not single asset  
18 real estate under the Code and the single asset real estate provisions do not apply.<sup>2</sup>

19 The combination of these cases led the author of an excellent law review article on the  
20 subject of single asset real estate to conclude as follows:

21 From these cases, it is clear a “single asset real estate” case is one in which the  
22 debtor derives its income (if any) solely from performing functions intrinsic to  
23 owning and developing the real estate and is not one where the debtor generates  
24 income from other activities not incidental to merely owning or developing the  
25 real estate. Applying this easily stated principle to the multitude of fact patterns  
presented by real estate bankruptcy cases is another matter.

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26 <sup>2</sup> The golf courses operating under the name “The Golf Club at Hawks Prairie” are not affiliated  
with the Debtor and are not part of the Debtor’s project.

1 John B. Butler III, Section 362(d)(3): A Singular Provision of the Bankruptcy Code, 6 DePaul  
2 Bus. & Com. L.J. 205 (Winter 2008).

3 The case law both before and after the adoption of the single asset rule looked to other  
4 aspects of the case. In a case that predates the rule, Fifth Circuit described a single asset debtor  
5 in the context of a bad faith filing analysis as follows:

6 The debtor has one asset, such as a tract of undeveloped or developed real  
7 property. The secured creditors' liens encumber this tract. There are  
8 generally no employees except for the principals, little or no cash flow,  
9 and no available sources of income to sustain a plan of reorganization or  
10 to make adequate protection payments . . . . Typically, there are only a  
few, if any, unsecured creditors whose claims are relatively small. The  
property has usually been posted for foreclosure because of arrearages on  
the debt and the debtor has been unsuccessful in defending actions against  
the foreclosure in state court.

11 *Little Creek Dev. Co. v. Commonwealth Mortgage Corp. (In re Little Creek Dev. Co.)*, 779 F.2d  
12 1068, 1073 (5th Cir. 1986).

13 The Debtor's list of its 20 largest unsecured creditors is instructive. The list reflects a  
14 legal bill of over \$290,000.00, and other creditors offering services specifically related to land  
15 development. The total unsecured debt of approximately \$376,000.00 is "relatively small" in  
16 contrast to the \$10 million to \$50 million in total debt indicated on the petition. *See* Docket  
17 No. 1.

18 The above facts clearly support a finding by this Court that the property falls within the  
19 Code's definition of single asset real estate and provide a basis for the application of the single  
20 asset real estate provisions of the Code to this case. The property constitutes a single project.  
21 Furthermore, the Debtor plans to derive its income solely from development and disposition of  
22 the property.

#### 23 IV. CONCLUSION

24 The debtor's property constitutes a single development project. Under all of the criteria  
25 applied in determining whether property falls within the single asset real estate definition and is  
26 subject to the single asset provisions for relief from stay, this case is clearly a single asset real

1 estate case and application of the 90-day deadline for commencing payments or filing a  
2 confirmable chapter 11 plan should be confirmed by order of this Court.

3 DATED this 18th day of August, 2010.

4 FOSTER PEPPER PLLC

5 /s/ Dillon E. Jackson

6 Dillon E. Jackson, WSBA #1539  
7 Attorneys for Secured Creditor  
8 HomeStreet Bank  
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